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No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

DANIEL S. ALTER
ALTER & ALTER
300 East 42nd Street
10th Floor
New York, NY 10017
(212) 867-7777

H. BARTOW FARR, III
(Counsel of Record)
RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, NW
Suite 800
Washington, DC 20036
(202) 775-0184

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REPLY BRIEF FOR PETITIONERS

Although the first question presented in this case is whether the Department of Labor's third party employer regulation is eligible for deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), respondent addresses that issue well past the mid-point of her brief, opening instead with a broad claim that the 1974 Amendments to the Fair Labor Standards Act ("FLSA") clearly and unambiguously deny the "companionship services" exemption to third party employers. Resp. Br. 5-10. However, not only is that contention directly contrary to the view of the Second Circuit below, *see* Pet. App. 5a ("[c]onsideration of congressional intent . . . does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)"), but it turns out to depend almost entirely on a farfetched new statutory argument—that there is a critical (and allegedly unmistakable) difference between the term "employed in domestic service," 29 U.S.C. § 206(f), and the term "employed in domestic service employment," 29 U.S.C. § 213(a)(15)—and on selective quotations from the legislative history that are themselves inconclusive and, for the most part, have nothing to do with "companionship services." Then, upon finally reaching *Chevron*, respondent dismisses the significance of notice and comment in two brief paragraphs and makes a striking argument about the relative unimportance of general rulemaking authority that is both largely irrelevant (because the Department also had, and invoked, a specific "define[] and delimit[]" authority) and erroneous (because this Court has given *Chevron* deference to numerous regulations promulgated under general rulemaking authority). Respondent and her *amici curiae* also put forward extensive policy arguments against the third party employer regulation, many of which simply track arguments that were before the Department several years ago when it decided, after further notice and comment, not to modify the regulation.

Despite this wide array of old and new arguments, we believe that the issues in this case are ultimately quite straightforward. As for *Chevron* eligibility: When Congress has expressly granted rulemaking authority to an administrative agency, and the agency has invoked that authority to conduct a notice-and-comment rulemaking, the resulting regulation should be eligible for *Chevron* deference unless the agency makes clear that it is not issuing a regulation of binding force (a showing that respondent cannot come close to making here). As for *Chevron* application: a regulation subject to the *Chevron* standard should be upheld as long as Congress has not clearly forbidden the agency interpretation, *see Barnhart v. Walton*, 535 U.S. 212, 218 (2002), and the regulation is otherwise within permissible bounds. In this case, notwithstanding respondent's contrary claim, Congress did not unequivocally say that the "companionship services" exemption is inapplicable to workers employed by third parties such as agencies and other family members, leaving it instead to the Department to establish, within reasonable limits, what the scope of the exemption would be. Its determination—that third party employers "are exempt" (29 C.F.R. § 552.109 (a))—is well within those limits, and objections to that decision, on the grounds that it is unwise or counterproductive, should be directed to the Department or to Congress. The regulation thus should be upheld.

I. The Third Party Employer Regulation Is Eligible For *Chevron* Deference

We begin where respondent does not: with whether the third party employer regulation is eligible for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Mead*, the Court said that an agency regulation qualifies for *Chevron* deference if it "appears that Congress delegated authority to the agency generally to make rules carrying the force of law" and that "the agency interpretation claiming deference was promulgated in the exercise of that authority."

Id. at 226-27. Respondent concedes that the first part of the test is met here (although she tries to belittle one of the two grants of authority), but argues that, despite the fact that the Department invoked its rulemaking authority and undertook notice-and-comment rulemaking, it nonetheless foreswore any intention to give the third party employer regulation "the force of law." *See* Resp. Br. 34-47. None of her arguments is persuasive.

In the first place, respondent is far too dismissive of the Department's resort to notice-and-comment rulemaking. This Court has pointed out that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication," *Mead*, 533 U.S. at 230, and the converse of that observation is true as well: it is the rare case in which this Court, or any other, has declined to apply the *Chevron* framework to a regulation promulgated after such procedures. That is for good reason. Not only does the use of notice-and-comment rulemaking tend to show that the agency was doing more than simply offering its opinion on a legal question—something that it is free to do without notice and comment (*see Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995)) —but it also assures that the regulation has received the kind of serious consideration that justifies *Chevron* deference.

Respondent barely mentions the reasons that notice and comment have been given such weight in the *Chevron* context, arguing instead that "[s]urely an agency can decide to adopt an interpretation without exercising its delegated authority to 'make rules with force of law' (in order, for example, to permit greater leeway for judicial construction) but do so after notice and comment." Resp. Br. 44. But, while that proposition is generally true—an agency does not violate the Administrative Procedure Act by engaging in non-mandatory procedures—it should not be taken as a license to turn *Chevron*-eligibility questions into long battles about

whether regulations issued after notice and comment are really just "interpretive rules" with unnecessary process. Thus, where a regulation has been issued after notice and comment, and in express reliance on grants of lawmaking authority extended by Congress, *see* pages 5-7 *infra*, the guiding presumption should be that the agency intended to use the power that Congress gave to it. That presumption can be overcome by clear evidence to the contrary, but the evidence should have to be very clear. *See, e.g., Hall v. EPA*, 273 F.3d 1146, 1155-56 (9th Cir. 2001) (agency statements that rules do not have precedential effect).

Respondent offers nothing of that kind here. Her principal argument for treating the third party employer regulation as an interpretive rule is that it is in a subpart headed "Interpretations." But this placement would be of critical significance only if interpretations were confined to interpretive rules, which they clearly are not. *See* Petr. Br. 27-28 (citing cases). [1] Thus, for example, in *Auer v. Robbins*, 519 U.S. 452 (1997), the Court gave *Chevron* deference to a Department of Labor regulation issued after notice and comment but likewise placed in a subpart headed "Interpretations"—a fact that the Solicitor General called to the Court's attention (Brief of the United States, No. 95-897, at 16 n.4)—finding that it was not "an unreasonable interpretation of the statutory exemption." 519 U.S. at 457.

We think, therefore, that an agency's use of the notice-and-comment process is a strong, if not decisive, indication that

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[1] Indeed, we see no good reason not to give *Chevron* deference even to "interpretive rules"—which may themselves have "the effect of creating new duties" (*Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991))—especially where, as here, the agency has legislative rulemaking authority and has issued the rule after notice and comment. *See* Petr. Br. 28 n.9; U.S. Br. 16-17. Where the agency has subjected the rule to notice and comment, the usual purpose of trying to distinguish between legislative and interpretive rules, *i.e.*, to see whether notice and comment are required, 5 U.S.C. § 553(b)(A), is simply not present.

the agency is promulgating a regulation with the force of law. Of course, to do so, the agency must have the authority to issue binding regulations, but that authority is plainly present here. Congress not only gave the Department the authority to "define[] and delimit[]" the terms of the "companionship services" exemption, 29 U.S.C. § 213(a)(15), but granted it the further authority "to prescribe necessary rules, regulations, and orders with respect to the amendments made by this Act." 88 Stat. 76. The Department then relied on both grants in promulgating the 1975 regulations, including the third party employer regulation, an express reliance that, combined with the fact that the regulation is written in binding terms (*see* Petr. Br. 24-25), supports the understanding that the regulation was meant to have the force of law. [2]

Respondent does not dispute that Congress provided the Department with two distinct grants of lawmaking authority. Rather, she argues at some length that the grant of general authority is a poor cousin of the more specific grant. *See* Resp. Br. 24-29. However, whether or not this is correct at some level—that is, whether certain agency regulations might be entitled to a sort of "super-*Chevron*" deference—it makes little difference here. The Court has repeatedly given extensive deference to regulations promulgated under general grants of rulemaking authority, both before and after *Mead*, including in *Chevron* itself. *See, e.g., National Cable & Tel. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005); *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987); *Chevron* 467 U.S. at 843. Respondent does not even discuss, much less attempt to discredit, those cases.

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[2] Respondent continues to contend, Resp. Br. 45-47, that the third party employer regulation is procedurally defective, an argument that the district court found not to be properly raised. Pet. App. 38-39a n.3. As we have discussed, Reply Br. 9-10 (Petition stage), this argument is wholly without merit, given the fact that the rulemaking gave all interested parties a full opportunity to comment on the central question: whether third party employers are within the scope of the "companionship services" exemption.

Respondent also argues that, unless the general grant of authority is given a lesser status, "the two grants of rule-making authority [would be] redundant." Resp. Br. 27. In addition to being beside the point (because the general grant is sufficient for *Chevron* deference), this is simply not so. The grant of authority in Section 213(a)(15) is in the nature of a congressional directive: it effectively tells the Secretary that he or she is to issue regulations with respect to the "companionship services" exemption. The general grant, on the other hand, leaves it to the Secretary to determine what (if any) rules and regulations are "necessary." Nothing in that grant, however, disables the Secretary from issuing regulations that address subjects covered by other complementary grants of authority.

In any event, the relationship between the two grants of authority is academic here because the Department exercised its "defin[ing] and delimit[ing]" power in promulgating the third party employer regulation. Respondent acknowledges that the Department explicitly referred to both grants as the basis for its regulations (all of them, not just the ones in Subpart A), but she objects that "the notice does not specifically cite the authority given DOL in § 213(a)(15) to 'define[] and delimit[]' the exemption's terms, but merely cites § 213(a)(15) as a whole." Resp. Br. 41. This argument, however, rests on the illogical proposition that, to engage in authorized lawmaking, an agency must actually quote the language of the authorizing provision, rather than just citing to it, and respondent offers nothing (except a law review article that says no such thing) to support that theory. And the Department's statement that "[t]he definitions required by seetion 13(a)(15) are contained in §§ 552.3, 552.4, 552.5, and 552.6," 29 C.F.R. § 552.2(c), means little because the Section 213(a)(15) grant of rulemaking authority is not limited to promulgating "definitions" but explicitly extends to setting the boundaries of ("delimiting") the exemption.

All that is left, then, to demonstrate that the Department did not use its Section 213(a)(15) authority for the third party employer regulation are two sentences in the preamble to the Final Notice repeating a general description of Subparts A and B from the Proposed Notice. *See* 40 Fed. Reg. 7404 (1975) ("Subpart A . . . defined and delimited [terms from Section 213(a)(15)]. Subpart B set out statements of general policy and interpretation concerning the application of the [FLSA] to domestic service employees.") These observations lend some support to respondent's view, but, in the end, we think that they are just too weak a basis for transforming a regulation that has the clear purpose and effect of delimiting the Section 213(a)(15) exemption into a regulation that is deemed to do something else. The plain fact is that Congress expected the Department to "elucidate a specific provision of the statute by regulation," *Chevron*, 467 U.S. at 844, and, the preamble notwithstanding, the Department, in each subpart of its regulations, carried out that responsibility. The third party employer regulation thus rests securely on both grants of rulemaking authority.[3]

In short, the Department's third party employer regulation fully meets the *Mead* standards for *Chevron* eligibility. That said, however, it seems highly doubtful that *Mead* actually requires the kind of microscopic scrutiny that respondent favors as the price of earning *Chevron* deference. The classification rulings at issue in *Mead*, which were among thousands of such rulings issued annually, were not promul-

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[3] We also note that the Department, in its 2005 Advisory Memorandum (Pet. App. 50a-64a), expressly stated that, "at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule." Pet. App. 63a-64a. Respondent is simply incorrect in asserting, Resp. Br. 42 n.42, that "the Memorandum does not characterize the *promulgation* of the regulation as an exercise of DOL's delegated law-making authority. . . ."

gated pursuant to any grant of rulemaking authority and did not undergo the process of notice and comment. Indeed, in concluding that those rulings did not merit *Chevron* deference, the Court repeatedly contrasted such informal agency actions with regulations promulgated after "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement [with the effect of law]." *Mead*, 533 U.S. at 230. There is thus little in *Mead*, or in cases following *Mead*, to indicate that the Court intended to cut back on *Chevron* deference for regulations that are issued under express grants of congressional authority and have been subjected to that "relatively formal administrative procedure."

At bottom, most of respondent's arguments—raising obstacle after obstacle for agencies to clear—are really just a challenge to the idea of *Chevron* deference in the first place. As this Court has observed, "*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps," *Brand X*, 545 U.S. at 982, a premise that carries even greater force where, as here, Congress has expressly instructed the agency to fill out the contours of a statutory provision. Yet, as respondent would have it, an agency that carries out its statutory duties, observing all necessary procedural requirements, will still be subject to judicial displacement because of its choice of subpart headings or introductory statements about the organization of its regulations. That approach would work a fundamental alteration of the principle of judicial deference, and the Court should reject it here.

II. The Third Party Employer Regulation Meets The *Chevron* Standard

The *Chevron* standard, which respondent never actually refers to, provides that a court reviewing an agency regulation must ask "whether the statute unambiguously forbids the [a]gency's interpretation, and, if not, whether the interpretation, for other reasons, exceeds the bounds of the permis-

sible." *Barnhart*, 535 U.S. at 218. On the statutory question here, our position, reflected in Section 552.109(a), is that, by enacting minimum wage and overtime provisions specifically applicable to workers "employed in domestic service," 29 U.S.C. § 206(f) (minimum wage) and "employee[s] in domestic service," 29 U.S.C. § 207(*l*) (overtime), Congress is best understood to have required *all* employers, not just individual homeowners, to pay the indicated wages to workers performing domestic jobs (as maids, housekeepers, etc.) in private homes. By the same reasoning, the Section 213(a)(15) exemption applicable to workers "employed in domestic service employment" who provide "companionship services" would likewise be available to all employers employing such workers to provide services in private homes, not just homeowners employing such employees. For their part, however, respondent and her *amici* ask this Court to divorce the terms of coverage from the terms of the exemption, claiming that, while the coverage provisions concededly apply to employees of both homeowners and third parties, Resp. Br. 6, the exemption applies only to employees of homeowners. Resp. Br. 6. That argument is insupportable on its own terms, and especially so under a proper application of *Chevron*.

A. The Statute. The entire statutory basis of respondent's argument, admittedly never made before, *see* Resp. Br. 10 n.2, is that there is a decisive difference between a) the phrases "employed in domestic service" and "employee[s] in domestic service" (which are used in the minimum wage and overtime coverage provisions) and b) the phrase "employed in domestic service employment" (which is used in the exemption), with the latter phrase, but not the former ones, purportedly applying only to employees employed by individual homeowners. But where does that difference come from? Although respondent contends that an extra word in the exemption provision—"employment"—was specifically included to limit the exemption to "the *relationship of 'employment*,'" Resp. Br. 6 (emphasis in original), that

explanation not only does nothing to establish that the employment must be by the *homeowner* and no one else (the critical point of the argument), but, in any event, makes little sense because the employment relationship is already required by the phrase "employed in," which (inconveniently for respondent's argument) also appears in the minimum wage coverage provision. (Indeed, the concept of "employment" is further captured in both the exemption and minimum wage provisions by use of the word "employee" and in the overtime provision by use of the words "employee" and "employer.") Moreover, the 1974 House Report uses the phrase "domestic service *employment*" in its description of the minimum wage *coverage* provision, not the exemption. *See* H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 11 (1974) ("[d]omestic service employees are described as those who are engaged in domestic service employment more than 8 hours in a workweek"). *See also* 29 C.F.R. § 552.99. All in all, therefore, the speculation that Congress actually intended the word "employment" to impose an otherwise unmentioned limitation on the exemption—in a provision that explicitly specified that *the Department* should define the exemption's terms—does not just fail the *Chevron* "unambiguously forbids" test, but fails any reasonable test of statutory construction.

Respondent is correct, of course, that the "relationship of 'employment'" is important to the Fair Labor Standards Act, but the point is that its importance is not just limited to the exemption for "companionship services." To the contrary, the emphasis on employers and employees throughout the 1974 Amendments establishes that the minimum wage and overtime laws do not generally apply to services provided by independent contractors. Thus, while independent contractors may perform domestic jobs in or about a private home, they are not, by those facts, drawn within the ambit of the Act, because they are not "employee[s] employed in domestic service," 29 U.S.C. § 206(f), or "employee[s] in domestic

service." 29 U.S.C. § 207(*l*). By the same token, given that the "companionship services" exemption is applicable only to domestic workers within the Act, the exemption provision also contains language pointing to the relationship between employer and employee ("any employee employed in domestic service employment"), though without specifying any particular kind of employer. 29 U.S.C. § 213(a)(15).

Respondent fares no better by insisting that, unless the word "employment" is given special significance in the exemption provision, it "would be synonymous with 'service' and therefore superfluous." Resp. Br. 9. While we think that the word "employment" is, in fact, redundant, that is not because it is synonymous with "service" but because it is synonymous with "employee" and "employed." For example, in Section 206(f), the minimum wage coverage provision, the wording could just as easily have read "any person (1) who . . . is employed in domestic service" without altering the meaning of that section. Similarly, the wording in Section 213(a)(15) could instead have been "any employee employed in domestic service" or "any employee in domestic service employment" without expanding or contracting the exemption. Again, the point is simply that there must be an employer and an employee, not that the employer must be the owner of the house.

Finally, respondent seeks to draw indirect support for her "plain meaning" argument from two provisions in statutes relating to Social Security taxes and benefits, *see* 26 U.S.C. § 3510(c)(1); 42 U.S.C. § 1320b-7(a)(3)—enacted 20 and 25 years *after* the 1974 Amendments—one of which defines the term "domestic service employment taxes" to mean "any taxes imposed by chapter 21 or 23 on remuneration paid for domestic service in a private home of the employer . . . ." 26 U.S.C. § 3510(c)(1). (The other provision merely contains a cross-reference to Section 3510.) But the Social Security framework and the Fair Labor Standards Act are different in important respects. Most notably, the Social Security scheme

contains provisions with regard to coverage that apply, by their terms, only to "domestic service in a private home of the employer," *see, e.g.*, 26 U.S.C. §§ 3121(a)(6), (a)(7)(A) & (B); 42 U.S.C. §§ 409(a)(6)(A)&(B), while the Labor Act conspicuously does not. That is because, as respondent acknowledges, Resp. Br. 5-6, the coverage provisions of the FLSA, unlike the Social Security provisions, do *not* generally make any distinction between domestic employees employed by the homeowner and domestic employees employed by third parties. Thus, while respondent is certainly correct that Congress was aware of various provisions of the Social Security framework, it is noteworthy that Congress did not put the limiting "private home of the employer" language into the FLSA. Respondent's attempt to do so retroactively—into one selected subsection and based on unrelated tax provisions enacted decades later—is too little, too late.[4]

B. Legislative History. Respondent and her *amici* devote much of their briefs to recitations from the legislative history of the 1974 Amendments, although very little of that history even mentions the "companionship services" exemption. Insofar as they intend to demonstrate that Congress wanted to improve conditions for workers "employed in domestic service," that is common ground: the parties and *amici* agree that the coverage provisions of the Amendments broadly apply to all workers "employed in domestic service," regardless of whether they are employed directly by the homeowner or by a third party. *See, e.g.*, Resp. Br. 6. But the fact that

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[4] The only direct reference to Social Security provisions in the domestic service part of the FLSA actually appears in one of the *coverage* provisions, 29 U.S.C. § 206(f)(1), which specifies, as one of two independent bases of coverage, that the employee be paid the minimum total amount of "wages" necessary for homeowner coverage under the Social Security framework (50 dollars per quarter in 1974). The alternate basis for coverage—that the employee work an aggregate total of eight hours in a workweek (counting all employers)—applies regardless of any Social Security provisions. 29 U.S.C. § 206(f)(2).

Congress had a sweeping general purpose does not, in itself, resolve the question here because Congress also enacted an express exemption for those domestic workers that provide "companionship services." Its decision to incorporate that exemption into the Act necessarily indicates that Congress found it important not to impose federal minimum wage and overtime obligations with respect to that particular job.

The numerous references to "housewives" in the legislative history also provide little help in analyzing the "companionship services" exemption. Those references are concerned with the coverage provisions of the Amendments, not the exemption, and, as we have noted several times, respondent does not argue that the coverage provisions are limited to workers employed by "housewives" (or by private homeowners generally). Thus, there is nothing in those statements on which to base an argument that, for reasons of consistency, the exemption also should be limited to workers employed by "housewives" (or by private homeowners generally). (Indeed, the argument for consistency would require that the exemption apply to *all* employers. *See* pages 8-11 *supra*.) Furthermore, the fact that "housewives" received much of the attention during the debates is hardly surprising, given that opponents of domestic service coverage chose that focus in order to emphasize the recordkeeping burdens that the Amendments would place on individual homeowners. *See, e.g.*, 119 Cong. Rec. 24,797 (statement of Sen. Dominick).

Respondent and her *amici* do cite some statements in the legislative history that actually involve the "companionship services" exemption, but those statements do not bear the weight that respondent and her *amici* seek to place on them. For example, although they argue that the "companionship services" exemption should apply only to workers employed by the homeowner because it, like the exemption for babysitting services, supposedly was aimed at workers that are not "breadwinners," *see* Resp. Br. 20-21, the argument makes neither textual nor practical sense. As a textual matter, it is

readily apparent that the language with respect to the babysitting and "companionship services" exemptions is very different: the babysitting exemption applies only to employees "employed on a casual basis," 29 U.S.C. § 213(a)(15), whereas the "companionship services" exemption carries no such restriction. Furthermore, the notion that "companions" employed by homeowners are in a unique category of nonbreadwinning domestic employees is doubtful for at least two reasons: *first*, the 1973 Wage Report stated that only three in ten domestic workers of any kind were heads of households in the early 1970s, *see* Department of Labor 1973 Wage Report to Congress at 28-29, indicating that Congress was not basing coverage on whether employees were supporting their families or not; and *second*, there is, in any case, no necessary correlation between the type of employer and whether the employee is a breadwinner. One federal court of appeals has flatly rejected just this kind of breadwinner/nonbreadwinner distinction. *See McCune v. Oregon Senior Services Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990).

Respondent and her *amici* also rely on a few statements describing companions as "elder sitters," *see, e.g.*, Alliance for Retired Americans Br. 5, using them to suggest that Congress did not intend the exemption to apply to workers (like home health aides) that provide more extensive care. But this contention is really just a roundabout way of attacking an entirely different Department of Labor regulation—the one defining "companionship services" (29 C.F.R. § 552.6)—and has little to do with the separate question of whether third party employers are entitled to the exemption. Furthermore, as several federal courts of appeals (including the Second Circuit below, *see* Pet App. 15a-22a) have concluded, the argument is unpersuasive on its merits. *See, e.g., McCune*, 894 F.2d at 1110; *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304, 1309-10 (7th Cir. 1995). Despite the isolated remarks about elder sitting, the exemption that Congress actually enacted is applicable to workers providing "companionship

services" to those persons—and only those persons—"who (because of age or infirmity) are unable to care for themselves . . . ." 29 U.S.C. § 213(a)(15). In light of that statutory language, it is most natural to define "companionship services," as the Department has done, to include both fellowship and the giving of care that clients are unable to provide for themselves.

Finally, respondent and her *amici* argue that Congress must have limited the exemption to workers employed by private homeowners because, otherwise, the exemption would deny minimum wage and overtime protection to workers who had previously been covered by the "enterprise" provisions of Sections 206(a) and 207(a). *See* Resp. Br. 11-13. But, in the first place, this argument proves too much. If the exemption were limited to homeowner employed workers, as respondent proposes, it would make the exemption inapplicable not just to workers employed by covered enterprises, but also to workers employed by other third parties such as small agencies and family members living in a different household, none of whom had been covered by the Act before. Respondent offers no reason to think that Congress wanted to deny the exemption to such previously uncovered employers.

It is also unlikely that Congress would have permanently narrowed the "companionship services" exemption because of possible concerns about what would then have been a very small number of workers. Although some domestic workers had been covered under the "enterprise" provisions before 1974, Congress was aware that "[t]he vast majority of the private household workers were employed directly by a member of the household." Department of Labor 1974 Wage Report to Congress at 32; 1973 Wage Report at 28. Assuming that this was true for persons providing "companionship services" as well—a fair assumption in 1974—then only a relatively few actual workers would have lost any existing protection as a result of the enactment of Section 213(a)(15). Indeed, although the Department had originally proposed a

regulation that would have put employees of a covered enterprise outside of the exemption, *see* 39 Fed. Reg. 35,385 (1974), it ultimately made a conscious decision, following notice and comment, to include them within the exemption. *See* 40 Fed. Reg. 7405.

In our view, the Department's conclusion is the most reasonable one, and certainly nothing in the statute or legislative history "forbids" it. As we have discussed, *see* Petr. Br. 39, Congress had never directly addressed the subject of applying the wage and hour laws to "companionship services" prior to 1974, and its decision to enact a broadly worded exemption for such services—without making any exception for workers employed by covered enterprises (or even grandfathering anyone who had formerly been covered)—indicates that it wanted persons unable to care for themselves to be able to obtain "companionship services" without the additional costs imposed by the federal wage and hour laws. *See* Petr. Br. 38-39. Furthermore, as a general matter, there is nothing at all unusual about Congress deciding to exempt workers employed by a covered enterprise: because the enterprise provisions supply the basis for covering most workers, including public employees, the exemptions set forth in Section 213 necessarily apply almost exclusively to workers employed by covered enterprises. Indeed, the most recently added wage and hour exemption not only exempts workers employed by covered enterprises, but exempts workers who had previously been covered by the Act. *See* 29 U.S.C. § 213(a)(17).

C. The Department's Regulations. Respondent also seeks to rest her divergent views of coverage and exemption on the Department's regulation defining the term "domestic service employment." *See* 29 C.F.R. § 552.3. However, the Department made clear in its 2005 Advisory Memorandum that Section 552.109(a) is the only regulation that addresses third party employment, and that Section 552.3 simply does not do so. Although respondent accepts that courts typically

must defer to an agency's reading of its own regulations, Resp. Br. 32, she says that this principle is confined to cases of ambiguity and that there is no ambiguity here because "two unambiguous regulations can conflict and that does not render either of them ambiguous." Resp. Br. 32 n.28. What this assertion overlooks, however, is the obligation to see whether seemingly conflicting regulations can be read harmoniously, *see Jay v. Boyd*, 351 U.S. 345, 360 (1956), or, to put it another way, the obligation to see if one or the other of the "unambiguous" regulations, read in context, might mean something different. Here, as the Department has said, that more searching analysis properly leads to an understanding that Section 552.3, while not ideally worded, *see* U.S. Br. 25, was really dealing with what type of work was covered by the 1974 Amendments and where it was to be performed, not with whether the employer actually had to be the homeowner receiving services. *See* Pet. App. 57a. The latter question was instead addressed directly in Section 552.109(a).

It also is doubtful that the definition in Section 552.3—if it actually meant what respondent says that it means—could be regarded as applying to the exemption alone. (Respondent concedes that the coverage provisions are *not* limited to workers employed by homeowners. *See* pages 9-13 *supra*.) Although the regulation begins "[a]s used in section 213(a)(15)," which suggests such a limitation, the bulk of the regulation then goes on to set out a non-exclusive list of the kinds of jobs that "the term includes," ranging from cooks and waiters to footmen and grooms. Those jobs have nothing to do with the exemption in Section 213(a)(15), which is limited to casual babysitters and workers providing "companionship services." Furthermore, no other regulation addresses the subjects that Section 552.3 addresses, despite the fact that they are integral to the Act as a whole. All this supports the notion that Section 552.3 is not an exemption-only definition of who must employ domestic workers, but rather a broadly

applicable definition of who domestic workers are. *See* U.S. Br. 28 & n.9.

Respondent also fails to address another weakness in her Section 552.3 theory: the double-edged language of 29 C.F.R. § 552.101(a). While Section 552.101(a) does parallel Section 552.3 in one respect—it says that "[t]he domestic work must be performed in or about the private home of the employer . . . " —it contains a second declaration that flatly contradicts that assertion: "[T]he term [domestic service employment] includes persons who are frequently referred to as 'private household workers.'" Despite an extended discussion of the term by one *amicus*, *see* Law Professors Br. 6-9, it is perfectly clear that, by "private household workers," the Department meant not just workers employed by homeowners, but also workers employed by "a household service business whose services had been requested by a member of the household occupying that residence." *See* 1973 Wage Report at 27; 1974 Wage Report at 32-33. Like members of Congress, therefore, *see* Petr. Br. 35-36, the Department used the terms "domestic service employees" and "private household workers" to mean the same thing, which seriously undermines any contention that the Department, in either Section 552.3 or Section 552.101(a), clearly intended to limit the scope of the exemption (or the Act itself) to employees employed by the homeowner.

Despite hazy emanations from other regulations, the Department has made one thing absolutely clear: that third party employers of workers providing "companionship services" are exempt from the minimum wage and overtime provisions. *See* 29 C.F.R. § 552.109(a). That regulation has been questioned at times,[5] but it has remained in force for more than

[5] The Department has several times proposed at least partial elimination of Section 552.109(a), *see* Petr. Br. 5, and, at various points (mostly during the period of efforts to eliminate it), the Department has either overlooked it or confined it to the "joint employer" context. *See* Resp. Br.

three decades. And, when all is said and done, nothing in the Act, the legislative history, or the Department's own regulations unmistakably bars that interpretation, or even points towards a better one. The regulation is valid.

III. The Policy Arguments Made By Respondent And Her *Amici* Do Not Justify Invalidation of the Regulation

Respondent and her *amici* make a wide-ranging series of policy arguments against the third party employer regulation, saying, among other things, that changes in the home care field have led to an increasing number of exempt workers and that invalidation of the regulation would help to attract more needed home care workers. Many, if not most, of these arguments were before the Department just six years ago when it last considered whether to modify the regulation; in fact, the Department set forth a number of them in its own notice of proposed rulemaking. *See* 66 Fed. Reg. 5482-83 (2001). Ultimately, however, the Department concluded that concerns about cost—some of them expressed by other federal agencies—tilted the balance against the proposed change. *See* 67 Fed. Reg. 16,668 (2002). Respondent is now effectively asking the Court to reweigh the possible pros and cons, substituting its own judgment for that of the agency, an invitation that is directly contrary to the principles of *Chevron*.

A few brief observations about the policy arguments are nevertheless appropriate. As an initial matter, it is a common element of the attacks on the regulation that they posit the availability of more money, an assumption that diminishes the need to confront potential tradeoffs between increased costs and reduced care (or possible institutionalization). But, as our supporting *amici* have pointed out in detail, this

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33 (citing opinion letters). These letters, however, were "rescinded and withdrawn" by the Department in 2002. *See* Admin. Op. Ltr. FLSA 2002-7, 2002 WL 32406597 (DOL August, 16, 2002).

assumption is at best highly debatable, at worst almost certainly wrong. The agencies providing home care workers to the elderly and disabled are often "small community-based not-for-profit organizations that operate virtually at cost," Continuing Care Leadership Coalition Br. 12, and, in New York, more than half of the home health care agencies are already losing money. *Id.* at 11. And the expectation that third party payors like Medicare and Medicaid will simply step into the breach seems very unlikely in view of the strong pressure to freeze, or cut, the outlays by those programs. *See id.* at 22-23.

Invalidation of the regulation would also create odd distinctions and incentives. For example, as the National Association for Home Care & Hospice brief points out, Medicare provides reimbursement for home health services only if they are provided by agencies that meet strict standards. *Id.* at 5-6. As a result, under respondent's view of the statute, no employee providing Medicare-covered services would ever fall within the Section 213(a)(15) exemption. Moreover, while Medicaid requirements vary depending on the State or service, "home health services" likewise must be provided by a qualified "home health agency." *See id.* at 6. And, even where reimbursement is not at issue, the limitations proposed by respondent and her *amici* would create a financial disincentive for homeowners to rely on workers from third party agencies, despite the considerable benefits (hiring, screening, recordkeeping, and the like) that agencies can provide to the particular individuals that Congress intended to help: those "who (because of age or infirmity) are unable to care for themselves." 29 U.S.C. § 213(a)(15). If those matters are now to be reexamined after 30 years, the Department and Congress are the proper forums, not the federal courts.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

DANIEL S. ALTER
ALTER & ALTER
300 East 42nd Street
10th Floor
New York, NY 10017
(212) 867-7777

H. BARTOW FARR, III
(Counsel of Record)
RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, NW
Suite 800
Washington, DC 20036
(202) 775-0184